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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re C.K. and A.K., Persons Coming
Under the Juvenile Court Law.

2d Juv. No. B166991, B172677
(Super. Ct. No. JV38919)
(San Luis Obispo County)

SAN LUIS OBISPO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

KRISTINE B.,

Defendant and Appellant.

Kristine B. appeals orders of the juvenile court granting physical custody of her sons to their father, Ron K., and dismissing the Welfare and Institutions Code section 300 dependency.¹ We affirm.

FACTS

Kristine B. and Ron K. married in 1991, and had two children, C.K. and A.K. The marriage was tempestuous and Kristine B. took the children, left Ron K., and

¹ All further statutory references are to the Welfare and Institutions Code unless stated otherwise.

sought a divorce. In 1998, in violation of a child custody order, Ron K. absconded with the children. Two years later, authorities learned of his whereabouts with the children in Florida. Ron K. was arrested and later convicted of felony kidnapping. The children then returned to live with Kristine B. in Templeton.

In Ron K.'s absence, the family law court had dissolved the marriage and awarded Kristine B. sole legal and physical custody of the children.

On January 8, 2002, the San Luis Department of Social Services ("DSS") filed a petition on behalf of ten-year-old C.K. and seven-year-old A.K. The petition alleged that the children's stepbrothers were using and selling marijuana in the family home. (§ 300, subd. (b).) The petition also stated that C.K. took marijuana from his mother's bedroom, smoked it, and provided some to his elementary school classmates. Concerning Ron K., the petition stated: "[Ron K.] has a longstanding history of advocating for the commercial production of hemp for industrial purposes."

At the detention hearing, DSS stated that Kristine B. claimed Cherokee Indian ancestry. DSS then mailed Form SOC 318, entitled "Request for Confirmation of Child's Status as Indian," to each of the three federally recognized Cherokee Indian tribes and requested determination whether the Indian Child Welfare Act ("ICWA" [25 U.S.C. § 1901 et seq.]) applied.

The Eastern Band of Cherokee Indians replied on January 17, 2002, that the children are neither registered nor eligible to register as tribal members. The Cherokee Nation replied on February 28, 2002, that it could not trace the children in its tribal records. On March 8, 2002, DSS received a response from the United Keetoowah Band of Cherokee Indians stating that the tribe had no evidence that the children are Keetoowah descendents. Each tribe stated that it would not intervene in the dependency.

Meanwhile, the juvenile court ordered the children detained and placed in foster care. Kristine B. and Ron K. later stipulated to the jurisdiction of the juvenile court and the court sustained the allegations of an amended petition. (§ 300, subd. (b).) On March 25, 2002, the juvenile court ordered that the children continue to live in a foster home and that the family receive family reunification services.

Ron K. has a disabling back injury and is not employed. He resides with his elderly paternal grandparents in Vacaville. His reunification services plan included parent education classes, anger management classes, personal counseling, and random drug testing.

Kristine B. lives in Templeton and receives emotional and financial support from her mother and stepfather. Kristine B. is employed and also enrolled in a college-nursing program. Her reunification services plan included substance abuse counseling, random drug testing, individual and family therapy, and parent education classes.

In August, 2002, the juvenile court ordered the placement of the children in the home of a paternal uncle and aunt, Frank and Danielle S., in Vacaville. The court granted Kristine B. weekend visitation with the children.

Kristine B. and Ron K. each complied with their respective family reunification services plan. The juvenile court and DSS urged the parents to mediate and settle custody and visitation issues regarding the children.

At the 12-month review hearing, DSS recommended that Ron K. receive custody of the children in a family maintenance program, in part because he would support and maintain his children's relationship with Kristine B. DSS also reported that the children's stepbrother again used marijuana. The juvenile court agreed with the DSS recommendation, and ordered an amended case plan with family maintenance services to the father. In its order, the court stated: "[T]here is no winner [here]. Because of the parent[s'] inability to get along; live in the same proximity; resolve their issues, the children continue to suffer. . . . [T]he court's ruling is . . . the lesser of two unattractive choices" The court also ordered that Kristine B. receive weekend visitation.

On June 4, 2003, "in an abundance of caution," DSS again sent notice under the ICWA. It mailed Forms SOC 318 and 319 ("Notice of Involuntary Child Custody Proceeding Involving an Indian Child)," to each of the three federally recognized Cherokee Indian tribes, by certified mail with return receipt requested. DSS received return receipts from the mailings. It then filed the return receipts and photocopies of the forms mailed to the three tribes, with the juvenile court. The court

found by clear and convincing evidence that notice was provided to the three tribes; the tribes declined to intervene; and ICWA does not apply to C.K. and A.K.

At the 18-month review hearing, DSS recommended that Ron K. receive sole physical custody of the children, Kristine B. receive visitation, and that the juvenile court dismiss the dependency. After a hearing, the juvenile court ordered that the parties share legal custody of the children, Ron K. receive sole physical custody, and the dependency be dismissed.

Kristine B. appeals and contends that 1) the juvenile court abused its discretion by granting physical custody to Ron K., and 2) DSS did not comply timely with the notice requirements of the ICWA.

DISCUSSION

I.

Kristine B. argues that the juvenile court abused its discretion by granting sole physical custody to Ron K., and by dismissing the dependency. She asserts that the evidence supports a finding that she "was by far the better choice" for physical custody. Kristine B. points out that Ron K. abducted the children. She adds that he has been unwilling to relocate to San Luis Obispo County. Kristine B. also relies upon her exemplary progress in parent education and individual counseling. In sum, she asserts that she offers the more stable home to the children, and that she would be more likely to encourage their contact with Ron K. The best interests of the children, she argues, are promoted by granting her physical custody. (See, Fam. Code, §§ 3011, 3020, & 3040.)

The juvenile court has discretion to determine custody in a dependency proceeding. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-320.) When a court has made a custody determination in a dependency proceeding, a reviewing court will not disturb that decision unless it is unreasonable or arbitrary. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087.)

Section 362 empowers the juvenile court to "make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of [a

dependent] child." When making a custody determination, the juvenile court's "focus and primary consideration" is "the best interests of the child." (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268.)

The juvenile court did not abuse its discretion. Although each parent had progressed in reunification services, including individual counseling and parent education, resentment between them lingered. The children's stepbrother used marijuana again, and DSS became concerned that Kristine B. did not adequately supervise the children at times. C.K. and A.K. were settled in school and activities in Vacaville and a return to Templeton would necessitate adjustment for them. Ron K. testified that he "absolutely" supported his sons' good relationship with Kristine B. Sufficient evidence supports the implied finding that physical custody with Ron K. is in the best interests of the children. (*In re Nicholas H., supra*, 112 Cal.App.4th 251, 268 [finding that neither parent poses danger to child does not mean parents entitled to joint custody].)

II.

Kristine B. asserts that DSS did not comply with the strict notice requirements of the ICWA until late in the dependency proceedings. (25 U.S.C. § 1901 et seq.) She argues that failure to provide notice is prejudicial error, invalidating the jurisdiction and disposition orders. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267 [compliance with ICWA notice is "absolutely critical"].)

The ICWA sets forth procedural and substantive standards regarding Indian children in state dependency proceedings. (*In re H.A.* (2002) 103 Cal.App.4th 1206, 1210.) Title 25 United States Code section 1912(a), requires that "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." In the event the identity or location of the Indian tribe cannot be determined, the moving party shall notify the Secretary of the

Interior. The ICWA "unequivocally" requires actual notice to the Indian tribe of the dependency proceedings and of the tribe's right to intervene. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.)

Notice is accomplished by completing and mailing by registered mail with return receipt requested, California Health and Welfare Agency Form SOC 319 with a copy of the dependency petition. (*In re H.A., supra*, 103 Cal.App.4th 1206, 1211-1215; *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108 [Form SOC 319 contains notice of the proceedings and of the right to intervene].)

The juvenile court must ensure that the ICWA notice requirements are satisfied. (*In re H.A., supra*, 103 Cal.App.4th 1206, 1211 ["[T]he superior court has a sua sponte duty to assure compliance with the notice requirements of the ICWA"].) To assist the juvenile court and to provide an adequate record on appeal, the moving party should file with the court a photocopy of the notice, the return receipts, and any correspondence received from the Indian tribe or the Secretary of the Interior. (*Id.*, at p. 1214-1215.) Failure to comply with the ICWA notice requirements is prejudicial error unless the Indian tribe has participated in or has stated it has no interest in the dependency proceedings. (*Id.*, at p. 1213.)

Here DSS mailed Forms SOC 318 and 319, with attached petitions, by certified mail return receipt requested, to each of the three federally recognized Cherokee tribes. The juvenile court determined by clear and convincing evidence that notice was proper, the tribes declined to intervene, and that the ICWA did not apply to C.K. and A.K. Although DSS had not complied with the strict notice requirements of the ICWA at the time of the jurisdiction and disposition hearings, the error is harmless. (*In re H.A., supra*, 103 Cal.App.4th 1206, 1213 [notice deficiencies are not prejudicial error if Indian tribe participates in or expressly indicates no interest in the dependency proceedings].) Each of the three Indian tribes here determined that C.K. and A.K. are not Indian children.

Moreover, DSS was not obliged to notify the Secretary of the Interior nor the Bureau of Indian Affairs because it knew the identity and location of the Indian tribes

involved. (25 U.S.C. § 1912(a); *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406 [if identity of Indian tribe is unknown, moving party shall notify the Secretary of the Interior or the Bureau of Indian Affairs].)

The orders are affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Sidney B. Findley, Commissioner
Superior Court County of San Luis Obispo

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